UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 4:18-CR-00139-RWS-NAB**
	)	
WILLIAM DOUGLAS HANING,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS SUPERSEDING INDICTMENT OR, IN THE ALTERNATIVE, TO DISQUALIFY PROSECUTORS BIRMINGHAM, SISON, AND BATEMAN

Defendant William Douglas Haning ("Haning"), by and through his counsel, Justin K. Gelfand, William S. Margulis, Arthur S. Margulis, Ian T. Murphy, and the law firm of Margulis Gelfand, LLC, respectfully files this reply to the Government's response to Haning's motion. (Doc. 92).

Haning's motion makes clear that this case presents the Government with a Catch-22: either the case is being prosecuted by Special Attorneys acting pursuant to the supervision and direction of an Acting Attorney General installed in violation of the Appointments Clause, or the Special Attorneys are acting without the Acting Attorney General's supervision and direction and the prosecution necessarily violates federal law. The Government's response makes clear that the path chosen by the prosecution team is that which violates federal law. (*See* Doc. 92 at 10-11) ("the current relevant chain of command for this recusal case, *from top to bottom*, is WDMO USA Tim Garrison, WDMO Criminal Chief Gene Porter, WDMO Fraud and Public Corruption Unit Chief Kate Mahoney (as a Special Attorney), and Charles Birmingham, Gilbert Sison, and Kyle Bateman as the line prosecutors on the case (also as Special Attorneys)") (emphasis added). It

cannot be reasonably disputed that, in order to comply with federal law, the authority of Special Attorneys to the Attorney General is expressly limited to that which is supervised and directed by the Attorney General. *See* 28 U.S.C. §§ 515, 516, 519, 543, 547.

It is telling that the Government's Response relies almost entirely on an internal Department of Justice ("DOJ") manual—the United States Attorneys' Procedures ("USAP")—as opposed to statutes, constitutional provisions, or case law. Moreover, despite the Government's request that this Court look exclusively to the USAP, the Government acknowledges that it has failed to comply with its provisions or even with the terms of the recusal notice issued in this case. Because the Government's response provides this Court with no legally justifiable reason for denying Haning's motion (Doc. 88), and because the Government has offered no response at all to fundamentally important issues raised by Haning, this Court should dismiss this prosecution.

This reply addresses six issues: (1) the Government has intentionally violated federal law by admittedly failing to prosecute this case under the direction and supervision of the Attorney General; (2) the constitutional error with respect to Matthew Whitaker's ("Whitaker") installation as Acting Attorney General in violation of the Appointments Clause is not remedied by the Government's attempt to insulate this prosecution by claiming that Whitaker does not fall within the supervisory chain of command of this case; (3) the Government's reliance on the USAP is misplaced as it does not have the force of law and the Government itself maintains that it "is an internal DOJ guidance document that was not intended to, does not, and may not be relied upon by this defendant to create any right, substantive or procedural, enforceable at law in this matter"[1]; (4) the Government has nevertheless failed to comply with the USAP and with the terms of the recusal notice; (5) if *Sigillito* is controlling—as the Government maintains—the Government has

[1] *See* Exhibit 1 (email correspondence from Government counsel refusing to provide a copy of the USAP to the defense in response to a discovery request).

failed to comply with the Eighth Circuit's mandate that the United States Attorney and all Assistant United States Attorneys be Special Attorneys in order to comply with the statutory framework; and (6) an evidentiary hearing remains necessary because important factual disputes remain unresolved.

I. In an Apparent Attempt to Insulate Itself from the Appointments Clause Challenge, the Government Has Intentionally Violated Federal Law

The Government has staked its position in this litigation in no uncertain terms: it is United States Attorney for the Western District of Missouri Timothy Garrison ("Garrison"), *not* the Acting Attorney General, who is singularly directing and supervising this prosecution:

- "all that has happened in this recusal is that *the WDMO USA stepped into the shoes of the EDMO USA* for all purposes related to this case";
- "it could not be any more clear that *the United States Attorney for the Western District of Missouri is in charge of this case*";
- "the current relevant chain of command, *from top to bottom*, is WDMO USA Tim Garrison, WDMO Criminal Chief Gene Porter, WDMO Fraud and Public Corruption Unit Chief Kate Mahoney (as a Special Attorney), and Charles Birmingham, Gilbert Sison, and Kyle Bateman as the line prosecutors on the case (also as Special Attorneys)";
- "*No different from any other matter or case undertaken by the United States Attorney for the Western District of Missouri, the WDMO USA does not need any further approval or supervision from the Attorney General* or any other official in the Department of Justice to pursue investigative and prosecutive actions in this case."

(Doc. 92 at 10-11) (emphases added).

The fatal flaw with this position is that United States Attorney Garrison has the authority to prosecute offenses *only* "within his district"—the Western District of Missouri. *See* 28 U.S.C. § 547. As such, unless Garrison—and all other prosecutors involved in this case—is appointed a Special Attorney to the United States Attorney General, takes the oath mandated by statute, and acts pursuant to the direction and supervision of the Attorney General, he has no authority to

prosecute this case in the Eastern District of Missouri. *See* 28 U.S.C. § 515; *see also United States v. Sigillito*, 759 F.3d 913, 929 (8th Cir. 2014) ("Because the [United States Attorney] and the AUSAs in the Western District USA were special attorneys in this case, they had the authority to prosecute Sigillito in the Eastern District USA").

The remainder of the statutory framework within which this case is supposedly being prosecuted further guts the Government's position. The law requires that "the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, *under the direction of the Attorney General*." 28 U.S.C. § 516 (emphasis added). Where, as here, the Government is purporting to exercise its authority through Special Attorneys to the United States Attorney General, "*the Attorney General shall supervise all litigation* to which the United States, an agency, or officer thereof is a party, *and shall direct* all United States attorneys, assistant United States attorneys, and special attorneys appointed under [28 U.S.C. § 543] in the discharge of their respective duties." 28 U.S.C. § 519 (emphasis added). Section 543 provides that the "*Attorney General may appoint* attorneys to assist United States attorneys when the public interest so requires" and "[e]ach attorney appointed under this section *is subject to removal by the Attorney General*." 28 U.S.C. § 543 (emphasis added). And the statute from which the Government expressly purports to derive its authority in this case—28 U.S.C. § 515—confers prosecutorial authority on others only "when specifically *directed by the Attorney General*" and only after the attorney has "take[n] the oath required by law" (emphasis added).

Indeed, the Department of Justice's Office of Legal Counsel ("OLC") itself has repeatedly recognized the importance of the Attorney General in these statutory functions. *See* John Harmon, Litigating Authority of the Office of Federal Inspector, Alaska Natural Gas Transportation System,

4B U.S. Op. Off. Legal Counsel 820, 1980 WL 20994 (1980) ("Section 519 in terms imposes *a mandatory duty on the Attorney General to supervise all litigation* involving the United States, except as otherwise authorized by law") (emphasis added); *see also Theodore Olson*, The Attorney General's Role as Chief Litigator for the United States, 6 U.S. Op. Off. Legal Counsel 47, 54, 59, 1982 WL 170670 (1982) ("While the Attorney General may delegate some litigating authority... *he may not delegate the ultimate responsibility which is by law vested exclusively in the Attorney General*") (emphasis added).

The legal authority on which Haning's motion is premised—all of which was cited in his motion and none of which the Government even acknowledges, let alone addresses, in its response—is comprised of binding federal statutes, DOJ OLC opinions, and case law, not the opinion pages of the *New York Times*. (*See* Doc. 92 at 18).[2] The Government has admitted that Acting Attorney General Whitaker is not even a part of "the current relevant chain of command" (*Id.* at 10) and the Government flaunts its disregard for statutes requiring the Attorney General's direction and supervision in cases involving Special Attorneys: "the WDMO USA does not need any further approval or supervision from the Attorney General or any other official in the Department of Justice to pursue investigative and prosecutive actions in this case." (*Id.* at 11). Congress disagrees.

By the Government's own admission—separate and apart from the Appointments Clause issue—the Government is violating federal law and apparently believes it is entitled to do so. For this reason alone, this Court should dismiss the superseding indictment. *See United States v.*

[2] The Government criticizes Haning's reference to a *New York Times* opinion piece by the former Acting Solicitor General indicating his view that Whitaker's appointment violates the Appointments Clause. *See* Doc. 92 at fn. 6 ("The opinion page of the *New York Times* is not a recognized authority for the support of legal arguments"). Haning makes no apology for his reference to this authority but, more importantly, observes that the Government completely ignores the abundance of law (the Constitution, federal statutes, federal case law, and DOJ OLC opinions) cited in Haning's motion.

Providence Journal Co., 485 U.S. 693 (1988) (dismissing matter for lack of jurisdiction where special prosecutor lacked statutory authority to represent the United States in a petition for a writ of certiorari even though district court judge appointed the special prosecutor to handle the underlying case); *see also United States v. Flores-Rivera*, 56 F.3d 319, 328, n. 7 (1st Cir. 1995) (federal courts inherently possess the "supervisory power to redress conduct not injuring defendants if the conduct is plainly improper, indisputably outrageous, and not redressable through the utilization of less drastic disciplinary tools").

II. The Government's Violation of the Appointments Clause is Not Resolved by the Government's Apparent Attempt at Insulating Itself by Claiming that Acting Attorney General Whitaker Does Not Fall within the Supervisory Chain of Command of this Case

In his motion, Haning set out significant constitutional law and case law in support of his position that the installation of Whitaker as Acting Attorney General violates the Appointments Clause of Article II, Section 2, Clause 2 of the United States Constitution. Haning—a criminal defendant charged with 50 federal felonies[3]—has advanced this challenge in this unique context in which the Government's prosecutorial authority is purportedly exercised exclusively by "Special Attorney[s] to the United States Attorney General." Because President Donald Trump's installation of Whitaker as Acting Attorney General was done without the advice and consent of

[3] In a footnote, the Government suggests that Haning lacks standing to challenge Whitaker's installation under the Appointments Clause. (*See* Doc. 92 at fn. 5). A criminal defendant charged with 50 felony counts has standing to file a motion to dismiss the indictment and/or to disqualify a prosecutor. More specifically, a criminal defendant purportedly being prosecuted by Special Attorneys to the United States Attorney General has standing to challenge the constitutionality of the appointment of the United States Attorney General—who, by law, has the responsibility to supervise and direct the prosecution. Incidentally, the case on which the Government relies, *United States v. Baker*, 504 F.Supp.2d 402 (E.D. Ark. 2007), is inapposite and does not address the unique arguments raised by Haning. Nevertheless, the case expressly references the Government's argument that United States Attorneys are "inferior officers" who act under the Attorney General. *Id.* at 406. Furthermore, contrary to the Government's argument, Haning has not raised "a generally available grievance about government" that does not state a case or controversy. (Doc. 92 at fn. 5). The Government initiated a case or controversy by charging Haning with 50 felonies and choosing to staff this case, purportedly, with Special Attorneys to the United States Attorney General. This grievance is uniquely available to Haning, unlike defendants not prosecuted under the purported authority of Special Attorneys to the United States Attorney General.

the Senate, Whitaker holds the authority of Attorney General improperly and in direct contravention of a Constitutional provision which "is among the significant structural safeguards of the constitutional scheme" and which "is designed first and foremost...to protect liberty." *N.L.R.B. v. SW General, Inc.*, 137 S.Ct. 929, 949 (2017) (Thomas, J., concurring); *see also Edmond v. United States*, 520 U.S. 651, 659 (1997). Haning analyzed *United States v. Eaton*, 169 U.S. 331 (1898), which addressed the position of vice-consul to Siam in the nineteenth century and why it does not bear on the question before this Court. (*See* Doc. 88 at 9-10). And Haning walked through a survey of relevant history in support of the inconvenient truth that the installation of Whitaker is unprecedented in this nation's history. (*Id.* at 10-11).

The Government does not acknowledge, much less respond to, these arguments other than to make the entirely unwarranted accusation that Haning's motion is driven by partisan politics. (*See* Doc. 92 at 17). Haning's constitutional, statutory, and jurisdictional challenge to this prosecution is not partisan—and the Government's refusal to engage with Haning's argument on the merits is telling.

The Government filed a supplemental response in opposition (Doc. 93) and attached as an exhibit an order issued by the United States District Court for the Western District of Texas (*United States v. Valencia, et al.*, 5:17-CR-882-DAE (Nov. 27, 2018)). This case is inapposite. *First*, the case did not involve Special Attorneys to the Attorney General. *Second*, the district court noted that, even if the installation of Whitaker violates the Appointments Clause, the United States Attorney for the Western District of Texas has the authority to prosecute the defendant in the Western District of Texas. *Finally*, the district court's analysis supports Haning's position. The court concluded: "the indictment in this case was returned before the appointment of the Acting Attorney General," and because the defendants "are being prosecuted by the United States

Attorney for the Western District of Texas 'within his district' under 28 U.S.C. § 547, the U.S. Attorney's Office has the authority to continue these prosecutions." *Id*. at 19. In other words, what mattered to the court in *Valencia* was that the indictment was issued prior to Whitaker's installation as Acting Attorney General (the superseding indictment in *Haning* was filed after Whitaker took office), and that the prosecution occurred within the district where the United States Attorney prosecuting the case has jurisdiction under 28 U.S.C. § 547 (unlike *Haning*).

Furthermore, the Government suggests that Haning's failure to respond—in an initial motion—to the Government's response—to a previously-filed motion—constitutes a concession to its arguments regarding the Federal Vacancies Reform Act of 1998 ("FVRA"). (*See* Doc. 92 at 18). The Government's argument is misguided. Unlike many of the other challenges to Whitaker's installation as Acting Attorney General, whether the Government complied with the FVRA is not the fundamental question this Court must answer. The other challenges ask courts to conclude that Deputy Attorney General Rod Rosenstein should be substituted as the Acting Attorney General. The Government has maintained in this litigation that Whitaker *is* the Acting Attorney General and Haning's argument is that because Whitaker's installation violates the Appointments Clause, these Special Attorneys to the Attorney General are acting without legal authority. In other words, if Whitaker lacks the authority to prosecute Haning, so too must his Special Attorneys.

The bottom line is that, because he was installed as Acting Attorney General in violation of the Appointments Clause, Whitaker lacks the power to prosecute this case—much less to supervise it, direct it, or to remove the Special Attorneys prosecuting it. The Special Attorneys in this case lack the legal authority to act without Whitaker's authority, and because this is mandated by statute, the Government cannot insulate this prosecution from dismissal simply by deciding to ignore these federal laws. The DOJ should never intentionally violate federal laws in any capacity.

This case is different from all other federal prosecutions pending throughout the country (some of which the Government might describe as partisan) because the United States Attorney in the Eastern District of Missouri and his entire office are recused and this case is supposedly being prosecuted by Special Attorneys to the United States Attorney General. (Docs. 1 and 83). The United States Attorney for the Western District of Missouri has no statutory or constitutional authority to prosecute Haning in this district. *See* 28 U.S.C. § 547 (giving a United States Attorney the authority to prosecute only "within his district"). Thus, to the extent United States Attorney Garrison's involvement in this case is legally permitted (a fact that remains unresolved), he too derives his limited authority subject to the Attorney General's direction and supervision.[4]

III. The Government Asks this Court to Rely on the USAP, Not Federal Law

The Government's response boils down to the assertion that the Government purports to have acted in compliance with the USAP sections addressing recusal and that, therefore, this Court should deny Haning any relief. This Court should reject the Government's invitation to ignore federal law.

As an initial matter, Haning made a discovery request for the USAP—but the Government refused to provide it. *See* Exhibit 1. Thus, this Court should not consider the USAP in its analysis because Haning has not had the opportunity to review it. It would violate Haning's due process rights for his motion to be denied pursuant to non-legal, intra-agency authority to which he and this Court have been denied access.

Perhaps more importantly, however, the Government asserts that the USAP "is an internal DOJ guidance document that was not intended to, does not, and may not be relied upon by this

[4] *See infra* at V. On December 17, 2018, Haning made a discovery request seeking, *inter alia*, "any appointment letter(s), appointment affidavit(s), and/or oath(s) of office for Timothy Garrison in connection with this case. If none exist, please let us know." *See* Exhibit 2. In response, the Government replied, "The Government does not intend to produce any additional materials in advance of the hearing." *Id.*

defendant to create any right, substantive or procedural, enforceable at law in this matter." Exhibit 1. The Government cannot have it both ways: if the USAP has no legal significance to a defendant when the Government violates its provisions, it cannot possess legal significance to the Government for the Government's purported compliance with it. Either it matters or it does not.

Finally, whether the Government has complied with internal guidance documents is not relevant where, as here, the Government has failed to comply with federal law and the Constitution.

IV. The Government Has Failed to Comply with the USAP and with the Terms of Its Recusal Notice

From the very limited portions of the USAP to which Haning does have access (referenced in the recusal notice), it is nevertheless clear that the Government has failed to adhere to its provisions.

Specifically, the Government failed to include the name and title of the Attorney General, then the name and title of the United States Attorney for the Western District of Missouri, and then the name and titles of the Special Attorneys to the United States Attorney General—as required by the USAP *and* by the terms of the recusal notice. (*See* Doc. 88 at 14-15). This signature block is not a formality; it reflects the chain of command required by the statutory framework applicable to a case being prosecuted by Special Attorneys. The applicable federal statutes plainly demand that any actions taken by a Special Attorney to the Attorney General be limited to those that are supervised and directed by the United States Attorney General. *See* 28 U.S.C. §§ 515, 516, 519, 543, 547. The operative charging document in this case, the superseding indictment, unquestionably fails to comply with this mandate.

In its response, the Government interprets the language in the "Formal Notice" that any "Special Attorney assigned the matter or case *should* sign any pleadings or documents using the signature block of the newly assigned USAO, with the addition of the Attorney General's name

preceding that of the United States Attorney" as a mere suggestion as opposed to a requirement. (Doc. 92 at 12) (emphasis in original). The Government argues: "Use of the word 'should' denotes a recommendation or advice, not a requirement." (*Id.*). And the Government acknowledges that the signature block in the superseding indictment was not the result of a mistake or a typo—but was in fact the result of intentional deliberation employed in an effort to avoid what the Government believe would present a more powerful Appointments Clause challenge. (*See id.* at 13) ("the prosecution team had a choice to make, because no matter how the signature block was constructed, the defense would argue that the superseding indictment was invalid. The WDMO USAO supervisory chain of command reviewed and approved the decision to use the modified signature block on the superseding indictment").

The Government's new spin on its intentional failure to comply with the terms of its recusal and with the provisions of the USAP, a procedure the Government asks this Court to uphold, is inconsistent with the representation by Government counsel to this Court on December 7, 2017 in a related matter:

> As Special Attorney assigned in the matter as reflected in our entry that we filed, those pleadings and documents filed in the case, *we were directed* to use the signature block of the Western District of Missouri with the addition of the Attorney General's name preceding that for the United States Attorney.

(*See* Doc. 92, Exhibit 6, 4:17-CR-100 Motion Hearing Tr. at 7) (emphasis added). This representation one year ago was truthful and understandable; Government counsel deemed the terms of the recusal notice a requirement. In its response filed one year later, the Government ironically points to this colloquy as confirmation that the prosecutors in this case are acting with lawful authority despite interpreting the USAP and recusal notice as only providing suggestions for their consideration.

In fact, it is not as if the Government actually interprets the word "should" as merely advisory in similar contexts. Surely, the Government would not suggest that Chief Judge Sippel's order that "[c]ounsel *should* instruct their witnesses not to answer a question while an objection is pending" and that "[n]on-examining counsel *should* remain seated during witness examination unless standing to make an objection" are merely recommendations or advice, not requirements. (*See* Chief Judge Sippel's Internal Process Requirement No. 13). And the Government would not sincerely argue that the local rule of this Court that "[t]he home address of a non-party *should* not appear in any filing" is merely advisory and can be completely ignored. (E.D.Mo. Local Rule 5-2.17(A)(5)).

The truth is that the Government made a conscious choice to disregard the terms of its recusal notice and the USAP—the same non-legal, intra-agency authorities it now asks this Court to uphold.

V. *Sigillito* Does Not Support the Government's Position

The Eighth Circuit's opinion in *Sigillito* is readily distinguishable from the present case. There, the Court lacked an evidentiary record because the defendant did not make the challenge until the appeal was filed; Attorney General Holder was validly appointed and his name appeared prominently on the indictment; the Government's pleadings followed the mandate regarding the signature block; there was no evidence that Government counsel issued grand jury subpoenas under their authority as Assistant United States Attorneys for the Eastern District of Missouri; the nature of the conflict was profoundly different because it did not involve the prosecution of a person by subordinates of his prior defense attorney who also served as an attorney for a cooperating witness against him; and the appellate panel had no record through which to evaluate facts relevant to actual conflicts of interest.

Nevertheless, the Government doubles down on *Sigillito* in its response, arguing that "the exact same recusal protocol used in this case also was implemented in the *Sigillito* case" and that this Court "need look no further than the language from the Eighth Circuit's opinion." (Doc. 92 at 20).

In *Sigillito*, the Eighth Circuit held in no uncertain terms: "Because the [United States Attorney] and AUSAs in the Western District [United States Attorney's Office] were special attorneys in this case, they had the authority to prosecute Sigillito in the Eastern District [United States Attorney's Office]." *See Sigillito*, 759 F.3d at 929. The decision which the Government calls "binding circuit precedent" in fact guts the Government's position. (Doc. at 23).

This is because, as it turns out, United States Attorney Garrison appears to have never been formally appointed a Special Attorney under the specific statutory requirements of 28 U.S.C. §§ 515 and 543 and Criminal Chief Phillip Porter ("Porter") was not appointed a Special Attorney until December 14, 2018 and did not take the oath required under Section 515 until December 17, 2018. (*See* Doc. 94, Exhibit 1). This second fact was hidden from the defense—and from this Court—until December 17, 2018 when Porter filed his entry of appearance. In fact, Porter's name is on the Government's Response filed three days before he was appointed a Special Attorney in this case and six days before the designation took effect with his oath of office. (*See* Doc. 92). Further, in its response, the Government expressly made representations to the contrary:

> every attorney who has appeared *or will appear* before this Court on this case *has been appointed* as a Special Attorney for that purpose…Here, the defendant cannot legitimately claim that the Government has not complied with the requirement that every prosecutor who has or will appear before this Court in this case must be appointed as a Special Attorney.

(*Id.* at 11-12) (emphasis added); *see also Sigillito*, 759 F.3d at 928-29 ("Because the [United States Attorney] and AUSAs in the Western District [United States Attorney's Office] were special

attorneys in this case, they had the authority to prosecute Sigillito in the Eastern District [United States Attorney's Office]") (emphasis added).

Until Porter filed his entry of appearance on December 17, 2018, the Government had not disclosed that this WDMO AUSA who is apparently second in the chain of command was not actually authorized to act as a prosecutor in this case until December 17, 2018 (the day the mandatory oath was administered). Immediately thereafter, Haning made a discovery request on the Government for any prior appointment documents and/or oath documents for Porter (to the extent they exist) and for any appointment documents and/or oath documents for Garrison (to the extent they exist). *See* Exhibit 2. The Government's response is concerning: "You have the Government's responses. The Government does not intend to produce any additional materials in advance of the hearing. We look forward to addressing the merits of your motion and any other pending issues directly with the Court on January 2nd." *Id.*

Thus, it appears that Porter—whom the Government claims has had considerable involvement in this case (the defense has been previously instructed to speak with him personally about discovery concerns and about plea offers)—was not authorized to prosecute Haning in this district until yesterday, approximately 11 months after this case was charged. Even more concerning, it appears that Garrison may never have been validly appointed as a Special Attorney to the United States Attorney General in this case as the Government is refusing to produce any documentation in support of his appointment.[5]

[5] To be clear, the recusal notice transmitted by email in 2017 does not constitute a formal appointment of a Special Attorney and does not include an oath required by 28 U.S.C. § 515. The Government effectively concedes as much by filing the appointment letters and oaths of prosecutors Birmingham, Sison, Bateman, Mahoney, and Porter. Either such documents do not exist with respect to Garrison or the Government refuses to provide them to the defense.

VI. An Evidentiary Hearing is Necessary Because Important Factual Issues Remain Unresolved

The Government continues to resist an evidentiary hearing, arguing in its response that this Court should "summarily" deny Haning's motion. (Doc. 92 at 23). But in doing so, the Government ignores that important factual disputes remain unresolved which unambiguously necessitate an evidentiary hearing. Among these disputes are:

United States Attorney Jeffrey Jensen's Involvement: In its response, the Government continues to deny that Jensen served as Haning's defense counsel. (*See* Doc. 92 at fn. 7) ("Defense counsel's firm has represented Haning throughout the criminal investigation and has continued to do so post-indictment"); (*see also id*. at 18-19) ("Defense counsel also criticizes the Government for our alleged failure to acknowledge that Jeff Jensen formally represented defendant Haning. Defense counsel knows that this criticism is unwarranted").

The Government's position is not only wrong, but profoundly concerning. Haning anticipates that the evidence introduced at the evidentiary hearing will establish that Jensen personally represented Haning during the criminal investigation and that Jensen communicated directly with current Government counsel in furtherance of that representation.

This matters because it strikes at the heart of the actual conflict of interest presented where, as here, subordinates working directly under Haning's former attorney (who also represented a cooperating witness) are prosecuting Haning.

Facts Underlying the Actual Conflict of Interest: In its response, the Government summarily asserts that there is no actual conflict of interest (while resisting an evidentiary hearing on this precise issue), but the Government does not even address Haning's arguments that Birmingham, Sison, and Bateman are full-time employees under Jensen, that Jensen decides whether they receive promotions, that Jensen is their direct supervisor on every other case, that

Jensen has some influence and control over their salaries, and so on. (*See* Doc. 88 at 18-20). Haning anticipates establishing these facts—and others—in support of his argument that the three EDMO prosecutors have an *actual* conflict of interest.

Grand Jury Subpoenas: In its response, the Government asserts that the superseding indictment issued without the name of any principal officer and the grand jury subpoena issued under the authority of an Assistant United States Attorney in this district are "two *isolated* and *aberrant* instances" (Doc. 92 at 12) (emphasis added). Haning has made a discovery request for all grand jury subpoenas issued in this case—expressly agreeing in advance to the redaction of literally everything on the subpoenas other than the name, title, contact information of the person requesting the subpoena, and the date. Without any explanation at all, the Government has refused to provide these documents. *See* Exhibit 2.

To be clear, if the Government's representation to this Court that this was an "isolated and aberrant" instance is true, the Government should have no problem providing the requested discovery. However, based on the Government's refusal to provide the discovery without so much as even an argument or explanation leads Haning to believe it is at least possible—indeed likely—that the Government issued other grand jury subpoenas in a similar fashion to the grand jury subpoena in the defense's possession (*i.e.* by an "Assistant United States Attorney"). This fact matters and Haning is entitled to this discovery. Furthermore, the Government's assertion in its response that "the form inserts the title 'Assistant United States Attorney' when asking the person filling out the form to identify the name of person who requested the subpoena," is incorrect. (*See* Doc. 92 at 14). This Court's review of the form cited by the Government coupled with the grand jury subpoena that the defense has in its possession will reveal that the title "Assistant U.S. Attorney" was inserted by the person requesting the subpoena.

VII. Conclusion

This Court can and should dismiss this case based on one fact alone: the Government is, by its own admission, intentionally violating federal law. That determination does not turn on whether the installation of Whitaker violates the Appointments Clause. However, if this Court is willing to overlook the Government's intentional violation of federal law, the fact that Whitaker has occupied—and is occupying—the principal office of the United States Attorney General in violation of the Appointments Clause is squarely relevant to a case where the Government's prosecutors are purporting to act as Special Attorneys to the Attorney General. These are threshold constitutional and statutory principles concerning the authority of the Government to proceed with this prosecution. Finally, if this Court were to somehow conclude that the Government's admitted violation of federal law and clear violation of the Appointments Clause do not matter, this Court should—at a minimum—disqualify the three EDMO prosecutors who continue to work as AUSAs in the Eastern District of Missouri for the attorney who previously represented Haning and cooperating witness Wilbur-Ellis in this criminal investigation.

For these reasons and all others raised in Haning's initial motion, this Court should dismiss the superseding indictment or, in the alternative, disqualify the three EDMO prosecutors.

Respectfully submitted,

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Certificate of Service

I hereby certify that I filed the foregoing through the Court's CM/ECF system which will provide notice of filing to all counsel of record.

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Tuesday, December 18, 2018 at 5:04:47 PM Central Standard Time

Subject: Request for production of USAP

Date: Thursday, December 13, 2018 at 1:59:18 PM Central Standard Time

From: Birmingham, Charles (USAMOE)

To: Ian Murphy, Art Margulis, William Margulis, Justin Gelfand

CC: Mahoney, Kate (USAMOW), Sison, Gilbert (USAMOE), Bateman, Kyle (USAMOE)

The Government's pleadings cited to three separate provisions of the United States Attorneys' Procedures Manual (USAP). The USAP sets forth internal policies and procedures that apply to the Executive Office for United States Attorneys (EOUSA) and all United States Attorneys' Offices (USAOs). As a strictly internal DOJ guidance document, the USAP is not a publicly available document. As courts have long recognized, such internal agency guidance documents are not intended to, do not, and may not be relied upon by third parties to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. *United States v. Caceres*, 440 U.S. 741, 749-54 (1979)(internal agency regulations that are not required by the Constitution or a statute are not enforceable by the defendant in a criminal prosecution), cited in *United States v. Manafort*, 312 F.Supp.3d 60, 75-76 (D.C. Cir. 2018) (denying defense motion to dismiss and holding that internal DOJ regulations pertaining to the Special Counsel do not create any judicially enforceable rights for the benefit of individuals under investigation).

Since the Government cited to the USAP in its pleadings, the defense asked the Government to provide it with a copy of the USAP. Because the USAP is only an internal DOJ guidance document, and not publicly available, we respectfully decline to produce the entire USAP to the defense. That said, and since three provisions of the USAP were cited in the Government's pleading, the full text of the three cited USAP provisions are set forth below.

USAP No. 3-2.170.001 (6)(B), in full, states:

> The Deputy Attorney General has authority to approve the recusal of a United States Attorney or USAO and, pursuant to 28 U.S.C. ¶ 515, to appoint an Attorney for the United States, another USAO, or other official responsible for the matter. The Deputy Attorney General has delegated that authority to the Associate Deputy Attorney General (ADAG). The ADAG reviews a request for recusal from EOUSA GCO, either approves or denies the request, informs EOUSA GCO of the recusal decision, and approves the reassignment of the matter.

USAP No. 3-2.170.001 (6)(C)(2)(b)(1), in full, states:

> Once the ADAG has approved the office-wide recusal of a USAO in a criminal matter or case, the EOUSA GCO will notify the Criminal Division and proximate USAOs of the ADAG's decision to recuse the USAO, to determine if either will assume responsibility for the matter or case. If both a USAO and the Criminal Division seek to handle the matter or case, or conversely if neither the Criminal Division nor any other USAO is willing to handle the matter, the ADAG will resolve the impasse by designating the office that will handle the matter or case. After a USAO assumes responsibility for a matter or case from a recused USAO, any AUSA who will be assigned to handle the matter or case must be appointed as a Special Attorney under 28 U.S.C. § 515. The USAO given responsibility for the matter or case is responsible for coordinating the appointment of the Special Attorney with EOUSA's Personnel Staff. See USAP 3-4.213.001, "Appointment of Special Assistant United States Attorneys and Special Attorneys," for more information on the appointment procedures.

USAP No. 3-2.170.001(6)(C)(2)(c), in full, states:

> Once the recusal has been approved and the matter or case assigned to either a new USAO or the Criminal or Civil Division, the United States Attorney of the recused USAO should take steps to ensure that the matter is closed and management, supervisory and reporting responsibilities, and all case files for the particular matter or case are transferred to the new USAO or the Criminal or Civil Division. This includes all administrative, ministerial, and financial litigation actions normally completed by the recused USAO, including input into LIONS and TALON. Thereafter, the recused USAO can only provide limited administrative support to the new USAO or the Criminal or Civil Division, such as furnishing copies of local rules, advising of local practice, assisting with scheduling, providing time before the grand jury, providing local information for grand jury and victim/ witness support services, or providing facilities for depositions. The recused USAO, however, should not make any decisions or take any substantive actions in the matter or case. The intent of this section is to make clear that once recusal of the matter or case has been approved by the ADAG and the matter or case has been transferred to a new USAO or the Criminal or Civil Division, the matter or case no longer belongs in any sense to the recused USAO.
>
> When a new USAO assumes responsibility for the recused case, it should process the case from the investigatory stage through and including any post-judgment actions, including any appellate work or actions required by the Financial Litigation Unit (FLU). The Special Attorney assigned the matter or case should sign any pleadings or documents using the signature block of the newly assigned USAO, with the addition of the Attorney General's name preceding that of the United States Attorney. Any administrative or ministerial support and any decisions should be provided by the Special Attorney's USAO and supervisory chain. In the event that the Special Attorney has substantive questions that the recused USAO is precluded from answering, the Special Attorney should contact EOUSA GCO for consultation and advice.
>
> When the Criminal Division or other litigating component assumes responsibility for the recused case, it should process the case from the investigatory stage through and including any judgment actions. When any post-judgment actions normally conducted by a USAO FLU become necessary, and the Criminal Division or other litigating component is unable to handle such actions, the Trial Attorney handling the matter should contact EOUSA GCO, which will assist the component in obtaining a USAO FLU section to conduct the post-judgment FLU actions.

Again, as stated above, the USAP, is an internal DOJ guidance document that was not intended to, does not, and may not be relied upon by this defendant to create any right, substantive or procedural, enforceable at law in this matter. We produce the cited USAP sections as a courtesy to the defense in a good faith effort to preclude further unnecessary litigation.

Tuesday, December 18, 2018 at 5:06:29 PM Central Standard Time

Subject: RE: U.S. v. Haning
Date: Monday, December 17, 2018 at 5:04:55 PM Central Standard Time
From: Birmingham, Charles (USAMOE)
To: Justin Gelfand
CC: William Margulis, Ian Murphy, Art Margulis, Sison, Gilbert (USAMOE), Porter, Gene (USAMOW), Mahoney, Kate (USAMOW), Bateman, Kyle (USAMOE)
Attachments: image001.png, image003.png

You have the Government's responses. The Government does not intend to produce any additional materials in advance of the hearing. We look forward to addressing the merits of your motion and any other pending issues directly with the Court on January 2nd.

cb

From: Justin Gelfand <justin@margulisgelfand.com>
Sent: Monday, December 17, 2018 12:36 PM
To: Birmingham, Charles (USAMOE) <cbirmingham@usa.doj.gov>; Sison, Gilbert (USAMOE) <gsison@usa.doj.gov>; Bateman, Kyle (USAMOE) <KBateman@usa.doj.gov>; Mahoney, Kate (USAMOW) <KMahoney@usa.doj.gov>; Porter, Gene (USAMOW) <GPorter@usa.doj.gov>
Cc: William Margulis <bill@margulisgelfand.com>; Ian Murphy <ian@margulisgelfand.com>
Subject: Re: U.S. v. Haning

Counsel:

We are writing to follow up on certain outstanding discovery requests and to request additional discovery – all of which we are requesting for purposes of the January 2, 2019 evidentiary hearing currently docketed.

Outstanding Discovery Request: On December 7, and again on December 12, we requested all grand jury subpoenas issued in connection with this case. We are aware of at least one grand jury subpoena issued in this case by an "Assistant United States Attorney" who is a full-time employee of the United States Attorney's Office in the Eastern District of Missouri ("USAO EDMO") despite the fact that the USAO EDMO is supposedly entirely recused from this case. As such, the authority under which all other grand jury subpoenas were issued is directly relevant to the pending motion to dismiss. As we set out in the initial discovery request, we have no objection to the Government's redaction of literally everything on each subpoena with the exception of the name, title, and contact information of the individual(s) requesting the subpoena and the date issued. Please provide this discovery to us without any further delay.

New Discovery Requests:

1. Mr. Porter filed his entry of appearance today and attached an appointment letter dated December 14, 2018 and an appointment affidavit with an oath of office dated December 17, 2018. Please provide any prior appointment letters and/or appointment affidavits and/or oaths of office for Mr. Porter or please confirm that no others exist.

2. Please provide any appointment letter(s), appointment affidavit(s), and/or oath(s) of office for Timothy Garrison in connection with this case. If none exist, please let us know.

Respectfully,

Justin K. Gelfand
Partner
Margulis Gelfand, LLC

8000 Maryland Avenue
Suite 420
St. Louis, Missouri 63105
P: 314.390.0230
F: 314.485.2264
margulisgelfand.com

From: Ian Murphy <ian@margulisgelfand.com>
Date: Wednesday, December 12, 2018 at 10:19 AM
To: "Birmingham, Charles (USAMOE)" <Charles.Birmingham@usdoj.gov>, "Sison, Gilbert (USAMOE)" <Gilbert.Sison@usdoj.gov>, "Bateman, Kyle (USAMOE)" <Kyle.Bateman@usdoj.gov>, "kate.mahoney@usdoj.gov" <kate.mahoney@usdoj.gov>
Cc: Justin Gelfand <justin@margulisgelfand.com>, William Margulis <bill@margulisgelfand.com>
Subject: U.S. v. Haning

Counsel:

Please consider this our formal request for supplemental discovery on behalf of our client William Douglas Haning ("Haning").

Please provide the United States Attorneys' Procedures ("USAP") manual cited in the "FORMAL NOTICE: Office-wide Recusal of the Eastern District of Missouri" email that was attached to the Government's recently filed response to Haning's pending motion to dismiss. The USAP does not appear to be publicly available and is directly relevant to the legal issues pending before the Court. It is critical that the USAP be produced without delay so that it can be utilized in the reply in support of Haning's motion to dismiss which is due on December 18, 2018.

Additionally, we are formally renewing our request for all grand jury subpoenas issued in connection with this case. We originally made this request on December 7, 2018, by email to Government counsel and have not yet received any response. We are aware of at least one grand jury subpoena issued in this case by an "Assistant United States Attorney" who is a full-time employee of the United States Attorney's Office in the Eastern District of Missouri ("USAO EDMO") despite the fact that the USAO EDMO is supposedly entirely recused from this case. As such, the authority under which all other grand jury subpoenas were issued is directly relevant to the pending motion to dismiss.

It is critical that we receive all grand jury subpoenas sufficiently in advance of the January 2, 2019 evidentiary hearing concerning the pending motion to dismiss.

Finally, please provide the application and affidavit for the seizure warrant related to the recently seized Mercedes Benz automobile. On December 6, 2018, Mr. Birmingham represented that these documents would be provided "no later than 12/13 (if not before)." The significance of December 13, 2018 is entirely unclear and we renew our request for these documents without any further delay.

Thank you in advance.

Respectfully,

Ian T. Murphy
Associate
Margulis Gelfand, LLC

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Attorneys at Law